STATE OF MICHIGAN

COURT OF APPEALS

JAMES M. SCHENDEN and CAROL M. SCHENDEN,

Plaintiffs/Counter-Defendants-Appellants,

and

KRISTIN M. SCHENDEN, KENNETH J. SCHENDEN, and JAMES M. SCHENDEN AND CAROL M. SCHENDEN IRREVOCABLE FAMILY TRUST,

Plaintiffs/Counter-Defendants,

v

GARY L. GRIFFITH, M.D, BARTON W. BOCK, ANN BENTLY JORGENSON, and CRAIG L. ANDERSON,

Defendants/Counter-Plaintiffs,

and

V. CARL SHANER,

Defendant/Counter-Plaintiff/Third Party Plaintiff-Appellee,

and

JOHN D. BYELICH and HARRIET BYELICH,

Defendants,

and

HAROLD C. SOUTHARD, GRETCHEN E. SOUTHARD, DWAYNE E. FOSTER, NANCY E. FOSTER, FRANCES C. MERRILL, and JOHNNE L. MERRILL,

UNPUBLISHED
February 11, 2003

No. 234825
Crawford Circuit Court
LC No. 94-003325-CH

Defendants/Counter-Plaintiffs/Cross-Defendants,

and

BRENT HAYDUK,

Third Party Defendant/Counter-Plaintiff/Cross-Plaintiff.

JAMES M. SCHENDEN and CAROL M. SCHENDEN,

Plaintiffs/Counter-Defendants-Appellees,

and

KRISTIN M. SCHENDEN, KENNETH J. SCHENDEN, and JAMES M. SCHENDEN AND CAROL M. SCHENDEN IRREVOCABLE FAMILY TRUST,

Plaintiffs/Counter-Defendants,

v

No. 235237
Crawford Circuit Court
LC No. 94-003325-CH

GARY L. GRIFFITH, M.D., BARTON W. BOCK, ANN BENTLY JORGENSON, and CRAIG L. ANDERSON,

Defendants/Counter-Plaintiffs,

and

V. CARL SHANER,

Defendant/Counter-Plaintiff/Third Party Plaintiff-Appellant,

and

JOHN D. BYELICH and HARRIET BYELICH,

Defendants,

and

HAROLD C. SOUTHARD, GRETCHEN E. SOUTHARD, DWAYNE E. FOSTER, NANCY E. FOSTER, and JOHNNE L. MERRILL,

Defendants/Counter-Plaintiffs/Cross-Defendants,

and

BRENT HAYDUK,

Third Party Defendant/Counter-Plaintiff/Cross-Plaintiff.

Before: Sawyer, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Plaintiffs/counter-defendants appeal as of right an order granting defendant/counter-plaintiff's motion for summary disposition under MCR 2.116(C)(10). This case was consolidated with defendant's appeal of an order denying defendant's motion to assess plaintiffs attorney fees and costs. These cases arose when plaintiffs sued to quiet title to a portion of a two-track road on their land that was being used by neighboring landowners to reach their properties, and defendant countersued to establish easement rights to the road. We affirm.

Plaintiffs argue that the trial court improperly granted defendant's motion for summary disposition because a material issue of fact existed with respect to whether defendant's use was permissive. We review the trial court's decision on a motion for summary disposition under MCR 2.116(C)(10) de novo, considering the evidence submitted by the parties in a light most favorable to the non-moving party. *Maiden v Rozwood*, 461 Mich 109, 118, 120; 597 NW2d 817 (1999).

An easement by prescription arises where a party has used another's property in a manner that is "open, notorious, adverse, and continuous for a period of fifteen years." *Plymouth Canton Community Crier v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000). If the use was permissive, however, a prescriptive easement will not arise. *Banach v Lawera*, 330 Mich 436, 440-441; 47 NW2d 679 (1951). While the burden of proving a prescriptive easement remained throughout trial with defendant, once defendant presented evidence that he or his predecessor had used the disputed land far in excess of fifteen years, the burden of producing evidence

shifted to plaintiffs to establish that defendant's use was permissive. *Widmayer v Leonard*, 422 Mich 280, 290; 373 NW2d 538 (1985).

Plaintiffs first argue that the trial court erred in shifting the burden of proof to plaintiffs to establish that defendant's use was permissive, because defendant had not presented evidence of use "far in excess of the statutory period." However, a showing of over twenty-five years of use is sufficient to shift this burden. See, e.g., *Haab v Moorman*, 332 Mich 126, 144-145; 50 NW2d 856 (1952) (citing cases). Moreover, for purposes of the burden-shifting inquiry, there appears to be no requirement that the use be confined to that of the party seeking the easement to the exclusion of the party's predecessors in interest. See *Widmayer*, *supra* at 283-284; *Haab*, *supra* at 144. While defendant's use alone does not satisfy the requirement, evidence suggested that all the property owners south of the plaintiffs' property had used the road to access their parcels since 1952. Therefore, because this evidence established well over twenty-five years of use, the trial court did not err in finding that plaintiffs had the burden to produce evidence that the use was merely permissive. *Widmayer*, *supra* at 290.

Accordingly, plaintiffs were required to provide evidence to support their assertion that defendant's use was permissive under MCR 2.116, which provides in part:

> When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her. [MCR 2.116(G)(4).]

Under this rule, this Court must consider the evidence "actually proffered in opposition to the motion" and may not rely on the "mere possibility that the claim might be supported by evidence produced at trial." *Maiden*, *supra* at 121.

The only evidence plaintiffs offered to suggest that defendant's use was permissive was Schenden's deposition testimony that when he bought the land, he told the caretaker who had lived at a gatehouse on the road since 1952 to continue allowing their neighboring property owners to use it, as his predecessor had done. Even assuming this disputed statement is correct, however, the caretaker indicated that she had never discussed who had the right to use the road with any of the landowners, and stated that neither plaintiffs nor their predecessors in title told her who had permission to use the road until this suit was filed in 1993. Moreover, none of the landowners testified that they had been granted permission by plaintiffs or their predecessors to use that portion of the road. Because plaintiffs failed to produce evidence that defendant's use was permissive, the trial court did not err in granting defendant's motion for summary disposition. MCR 2.116(G)(4); *Widmayer*, *supra* at 290.

Plaintiffs' argument that no prescriptive easement was established because the road "passes through wild and unenclosed lands which are used for recreational purposes" is without merit. Although plaintiffs correctly state the law regarding easements over wild lands, see *DuMez v Dykstra*, 257 Mich 449, 451; 241 NW 182 (1932), it is not applicable here because

plaintiffs' land was not wild and unenclosed. Rather, it was improved by a manned gatekeeper's residence, and the road itself was cordoned off by a chain.

Finally, plaintiffs argue that defendant's use of the road was permissive rather than adverse because, although they had never expressly given defendant permission to use the road, they had not interfered with his use until this suit was filed, and furthermore, defendant never told anyone that his use was under claim of right. However, these facts have no bearing on the determination whether defendant's use was adverse. For purposes of proving the elements of a prescriptive easement, adverse use is that which is "inconsistent with the right of the owner, without permission asked or given, use such as would entitle the owner to a cause of action against the intruder." *Mumrow v Riddle*, 67 Mich App 693, 698; 242 NW2d 489 (1976). The fact that plaintiffs did not object to defendant's use did not render it permissive, *id*. at 697-698, nor was defendant "required to make express declarations of adverse intent during the prescriptive period." *Id*. at 698. For these reasons, the trial court did not err in granting defendant's motion for summary disposition.

Defendant argues that plaintiffs' failure to provide evidence to support their claim of permissive use rendered their claim frivolous, and therefore the trial court erred in denying their request for attorney fees. We review the trial court's determination that plaintiffs' action was not frivolous for clear error. *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999). A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

Under MCL 600.2591(3)(a), an action is frivolous if any one of the following conditions exists:

> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.

Whether a claim is frivolous under this provision depends on the facts of the case. *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002). The trial court found that the second subsection was the only section that may have been applicable, but decided that plaintiffs' action was not frivolous because their complaint stated only that plaintiff had previously given permission for all the property owners to use the road, and did not claim that any individual defendant had actually received permission.

An attorney has an affirmative duty to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed. MCR 2.114(D); *LaRose Market v Sylvan Center*, 209 Mich App 201, 210; 530 NW2d 505 (1995). The reasonableness of the inquiry is determined by an objective standard and depends on the particular facts and circumstances of the case. *Id.* In this case, plaintiffs' attorney accepted plaintiff's statement that he had given defendant permission to use the road, although plaintiff's deposition testimony revealed that he only expressed this permission to the caretaker of the property rather than to defendant himself.

Taking plaintiff's initial statement at face value, however, we cannot say that plaintiffs' attorney had "no reasonable basis to believe that the facts underlying that party's legal position were in fact true." MCL 600.2591(3)(a)(ii). Although this was insufficient to preclude summary disposition, that fact alone does not render the complaint frivolous. *Kitchen*, *supra* at 662. Accordingly, the trial court did not clearly err in refusing to award defendant attorney fees.

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Pat M. Donofrio